

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re:)	
)	
Transaction Network Services, Inc., TYSY)	CC Docket No. 95-155
Acquiring Solutions, LLC and Electronic)	
Payment Systems, LLC)	
)	
Regarding FCC Jurisdiction and RespOrg)	
Responsibilities to Comply with Part 52 of)	
the FCC's Rules and the MS/800 Tariff)	
Requirements)	
To: Office of the Secretary		
Attn: Chief, Wireline Competition Bureau		

**ELECTRONIC PAYMENT SYSTEMS, LLC'S OPPOSITION
TO TSYS' PETITION**

**Scotty P. Krob
Attorney at Law
8400 E. Prentice Avenue
Penthouse
Greenwood Village, CO 80111
(303) 694-0099**

February 23, 2011

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND: ARBITRATION AND JUDICIAL FINDINGS, JUDGMENTS AND ORDERS	2
III.	NEITHER THE ARBITRATOR'S AWARD NOR THE COURT'S JUDGMENT ARE CONTRARY TO THE FCC'S REGULATIONS AND POLICIES	4
A.	TRANSFERS ARE NOT COMPLETELY BARRED, PARTICULARLY UNDER THE CIRCUMSTANCES OF THE PRESENT CASE	4
B.	THE TRANSFER OF THE 1-800 NUMBERS DOES NOT INVOLVE HOARDING OR BROKERING	6
IV.	EPS ACTED PROPERLY IN PROTECTING WHAT IT CONTRACTED FOR AND WAS AWARDED ...	6
V.	IT IS PREMATURE FOR THE FCC TO ADDRESS THE ASSIGNMENT OF TSYS' SUBSCRIBER INTEREST TO EPS	8
VI.	CONCLUSION	9

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re:)	
)	
Transaction Network Services, Inc., TYSY Acquiring Solutions, LLC and Electronic Payment Systems, LLC)	CC Docket No. 95-155
)	
)	
Regarding FCC Jurisdiction and RespOrg Responsibilities to Comply with Part 52 of the FCC's Rules and the MS/800 Tariff Requirements)	
)	
 To: Office of the Secretary		
Attn: Chief, Wireline Competition Bureau		

**ELECTRONIC PAYMENT SYSTEMS, LLC'S OPPOSITION
TO TSYS' PETITION**

I. INTRODUCTION

TSYS Acquiring Solutions, Inc. ("TSYS") petitions the Federal Communications Commission ("FCC") to intervene in federal litigation where TSYS has lost at every turn. The petition is without merit and should be dismissed or denied.

TSYS' petition seeks to use the FCC's processes to relitigate or avoid the execution of a ruling entered against TSYS in binding arbitration, upheld in Federal District Court twice and now on appeal to the U.S. Court of Appeals. To persuade the Commission to intervene in a previously completed Federal Court proceeding, TSYS depicts a simple dispute between two parties as a major public policy issue. TSYS grossly exaggerates the implications related to transferring the 800

numbers and substantially misrepresents the facts which have been conclusively determined by the Court.

II. BACKGROUND: ARBITRATION AND JUDICIAL FINDINGS, JUDGMENTS AND ORDERS

This is a dispute between two commercial entities that, by agreement of the parties, has been resolved through arbitration. The edicts of Congress and the United States Supreme Court are clear that arbitration is to be favored and encouraged¹ as it reflects a policy that guarantees enforcement of private contractual arrangements.² It is the arbitrator who is to determine the facts between the parties and once he has done so, those facts are binding on the parties and cannot be altered by the courts.³ The arbitrator's determination of the facts are binding not only in subsequent court proceedings,⁴ but also in subsequent proceedings before administrative agencies, such as the FCC.⁵

After two weeks of arbitration hearings, the arbitrator found TSYS and its witnesses completely lacking in credibility, and ruled against TSYS and in favor of EPS on each and every one of the eleven claims and counterclaims asserted between the parties. The indisputable facts as

¹*Hall Street Assocs., LLC v. Mattel, Inc.*, 522 U.S. 576, 128 S. Ct. 1396 (2008).

²*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985).

³*American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1285 (9th Cir. 1982) (The arbitrator's decision is what the parties bargained for and it is not to be disturbed by a reviewing court.)

⁴*Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360, 86 S. Ct. 1545 (9th Cir. 1985) (Once arbitrator's award has been confirmed by district court and becomes a judgment of that court, "the determination of issues in an arbitration proceeding should be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated.")

⁵*U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-23 (1966) (Collateral estoppel principles apply equally to administrative agencies as they do to federal courts.)

conclusively determined by the arbitrator, and as subsequently interpreted and confirmed by the Court in its Order (Doc. 102 - page 2)⁶ are as follows:

TSYS and EPS are involved in the credit/debit card industry. The parties entered into an agreement in August 2005, which provided that EPS would use the processing services of TSYS. . . . As part of the agreement, TSYS agreed to install an exclusive 1-800 number on the point-of-sale terminals of EPS's merchant customers. EPS sought the exclusive number because it would permit EPS to move its merchant portfolio to another payment processing vendor if problems arose with TSYS. TSYS did not provide EPS with an exclusive 1-800 number, but rather "boarded" EPS merchants on seven 1-800 numbers also used by hundreds of thousands of non-EPS merchants.

The Arbitrator found TSYS' actions to be a material breach of contract and ordered TSYS to correct its breach. The chosen remedy was that TSYS should move non-EPS merchants that were being served on the same 1-800 numbers as EPS to other 1-800 numbers, and that EPS be made the customer of record for the 1-800 numbers which are used for EPS' merchants. These actions are deemed necessary by the Arbitrator and the Federal Court to give EPS the benefit of its contractual bargain.

In order to avoid interrupting the ability of non-EPS merchants to process transactions, the Court ordered a two step process:

Step 1: Make the EPS 1-800 numbers unique by having TSYS move the non-EPS merchants to non-EPS 1-800 numbers. Once this is done, any adverse impact on merchants using the EPS 1-800 numbers to complete transactions will be eliminated. Only EPS merchants will be using the EPS 1-800 numbers to complete transactions, and non-EPS merchants will be able to complete transactions using their new, non-EPS 1-800 numbers.

⁶Case No. 2:09-cv-0155, TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC, ("the Confirmation Case") See Order dated January 28, 2011 (Doc No. 102), as modified by Order dated February 15, 2011 (Doc. No. 108)

Step 2: Enforce TSYS' voluntary contractual commitment to transfer TSYS' interest as the subscriber having control over the EPS 1-800 numbers to EPS.

TSYS has repeatedly sought to avoid compliance with the portion of the Arbitrator's Award concerning the conveyance of the 1-800 numbers to EPS. TSYS, in order to save money, sought to avoid the Court's judgment by proposing to move EPS merchants to new 1-800 numbers rather than moving TSYS' other clients. The Court rejected TSYS' proposal and ordered TSYS to move the non-EPS merchants within 90 days.⁷ TSYS now turns to the FCC to overturn both the Arbitrator's Award and the Federal Court ruling.

III. NEITHER THE ARBITRATOR'S AWARD NOR THE COURT'S JUDGMENT ARE CONTRARY TO THE FCC'S REGULATIONS AND POLICIES

EPS recognizes the FCC's role in regulating the assignment of 1-800 numbers. Neither the Arbitrator's Award nor the Court Order subvert the FCC regulations or policies. TSYS' assertions that EPS has sought to avoid FCC jurisdiction, that EPS is in some manner engaging in hoarding or brokering 1-800 numbers, or that TSYS' breach of contract can only be corrected in a "life and death" scenario, are histrionic nonsense.

A. TRANSFERS ARE NOT COMPLETELY BARRED, PARTICULARLY UNDER THE CIRCUMSTANCES OF THE PRESENT CASE

The ruling in *In the matter of Toll Free Service Access Codes*, 22 FCC Rcd 651 (2007), relied on by TSYS is easily distinguishable from the present circumstances. That ruling involved a forced transfer from an existing subscriber who had not agreed to transfer the number to the new subscriber. Here there is no forced transfer or reassignment of the number, as TSYS voluntarily contracted to

⁷Case No. 2:09-cv-0155, TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC, ("the Confirmation Case") See Order dated January 28, 2011 (Doc No. 102), as modified by Order dated February 15, 2011 (Doc. No. 108)

provide the toll free numbers to EPS. Even the *In re Toll Free Service* ruling recognizes that in some circumstances numbers may be transferred by voluntary agreement of the parties. Footnote 3 of the *In re Toll Free Service* ruling indicated the hope of the FCC that the parties could negotiate a solution to transfer certain numbers. Section 6 of the ruling indicated the FCC would revisit the matter in a year to see whether “any permanent agreement [was] negotiated between the parties.” These passages strongly indicate that where, as here, the parties reach an agreement to transfer the numbers, the FCC will allow the transfer. Section 8 of the Toll Free ruling expressly recognizes the ability of the FCC to authorize and direct assignment of toll-free numbers on a basis different than the usual first-come, first-served basis.

What EPS will ultimately seek from the FCC is consistent with and contemplated by FCC regulations and policies. Section 52.111 on its face recognizes there is no absolute bar to assignment of subscribers’ interests. Section 2.1.7 of the Tariff specifically references subscribers “and their assignees.” Section 2.2.2 prohibits hoarding or brokering or transferring numbers for a fee. EPS is not engaging in any of these prohibited activities.

The current situation is analogous to a merger or an acquisition situation in that it merely implements a voluntary contractual agreement entered into by the parties to ensure the ability of EPS to continue to operate its business without interruption after it ceases doing business with TSYS. After the transfer has been completed, the same merchants will be using the same numbers for the same purpose of completing credit card transactions without interruption.

The only FCC policy implication which would arise with a waiver request in the present circumstances favors granting the transfer to EPS. This is because TSYS’ refusal to comply with its contractual obligation and with the Court’s Order and Judgment here illustrates the wisdom of

the Commission's 800 number "portability" policy.⁸ EPS was unable to protect its own interests except through breach of contract litigation because the toll-free numbers at issue were established with TSYS as the customer rather than EPS. Had EPS been the customer of record from the beginning, as it should have been, then EPS as the user would have been in control of its own services and TSYS would not have been able to engage in prolonged litigation rather than comply with its contractual obligations. In effect, by establishing the number in its own name, TSYS thwarted the 800 number portability policy and forced EPS to litigate to protect its rights. Ironically, TSYS now asks the FCC to assist it in this endeavor.

B. THE TRANSFER OF THE 1-800 NUMBERS DOES NOT INVOLVE HOARDING OR BROKERING

TSYS' argument that EPS would be hoarding or brokering the EPS numbers lacks any merit. Hoarding is obtaining numbers and not using them.⁹ Since, even TSYS admits that all seven numbers are used by EPS merchants for electronic transactions, the numbers would be in use. EPS merchants currently use and will continue to use all seven numbers. There are no numbers that are being hoarded and not used. EPS likewise would not be brokering the numbers to another for consideration. The agreement in 2005 was part of the larger agreement to provide processing services to EPS in a manner that ensured the continued business operation of EPS and its merchants. There was no sale of the numbers in 2005 and there is no sale of the numbers now.

IV. EPS ACTED PROPERLY IN PROTECTING WHAT IT CONTRACTED FOR AND WAS AWARDED

TSYS' assertion that EPS has acted in some improper manner that took TSYS by surprise

⁸*Beehive Tel. Co., Inc. v. FCC*, 179 F.3d 941 (D.C. Cir. 1999)

⁹ 47 C.F.R. § 52.107

in seeking to collect what EPS has been awarded by the arbitrator is yet another knowing misrepresentation by TSYS. TSYS has known literally for years what EPS was awarded and that EPS intends to collect what it was awarded. There was no surprise to TSYS. On January 20, 2009, TYS received the the arbitrator's award ordering TSYS to transfer its interest in the 800 number to EPS. TSYS failed and refused to do so. On May 4, 2010, TSYS received the Court's Confirmation Judgment, ordering TSYS to transfer its interest in the numbers to EPS. TSYS failed and refused to do so. In response to a Court Ordered Deposition, in June 2010, TSYS provided a declaration identifying the actual 800 numbers as well as providing the name and address of the Resp Org, TNS, that provided the numbers to TSYS. It should have come as no surprise to TSYS that EPS would utilize the information TSYS provided to seek to implement the Court's Judgment and protect what EPS was awarded.

Seeking the writ was necessitated by TSYS' continued misconduct and refusal to comply with the arbitrator's and the court's orders. The arbitrator and the Court repeatedly found the presence of EPS and non-EPS merchants on the EPS numbers was the result of TSYS' misconduct in failing to provide EPS its own unique number. After the arbitrator told TSYS the number was to go to EPS, TSYS continued to add more non-EPS merchants to the numbers, exacerbating rather than correcting the problem TSYS caused. Even after the Court ordered TSYS to transfer the numbers to EPS for its exclusive use, TSYS still continued to add yet more non-EPS merchants to the numbers. TSYS admits that during the time period that TSYS was under an arbitrator's order and a federal district court's judgment ordering TSYS to make the EPS numbers unique to EPS, and to facilitate the transfer of TSYS' interest to EPS, TSYS increased the number of non-EPS merchants on the EPS numbers from 515,000 to over 750,000. TSYS continued to exacerbate the

problem it created even after it was under a court order to fix it. Under these circumstances it was prudent and proper for EPS to obtain the writ to try to limit the damage TSYS continued to cause.

TSYS has provided no authority requiring EPS to provide notice of the writ. Had EPS done so, TSYS would undoubtedly have sought to create yet another obstacle to EPS receiving what it has been awarded and what the court has ordered TSYS to provide. There is no obligation for EPS to assist TSYS in its misconduct.

V. IT IS PREMATURE FOR THE FCC TO ADDRESS THE ASSIGNMENT OF TSYS' SUBSCRIBER INTEREST TO EPS

It would be premature for the FCC to decide the issue of whether to allow the transfer of the EPS numbers from TSYS to EPS in response to TSYS' petition. The Court has ordered that the transfer of the numbers from TSYS to EPS not take place until the non-EPS merchants have been moved to non-EPS numbers. The Court has further ordered TSYS to move the non-EPS merchants to non-EPS numbers by May 15, 2011. Therefore, the issue of the transfer of the numbers from TSYS to EPS is not at issue until after that date, not now. (Note, the Court's order that TSYS move the non-EPS merchants from some of TSYS' existing numbers to other existing TSYS numbers is not an FCC matter as it does not involve the assignment or transfer of 800 numbers).

The manner in which the issue should have been presented to the FCC, and the way it will subsequently be presented by EPS to the FCC to the extent FCC approval is needed, is the way the arbitrator and the Court have determined the facts to be:

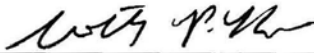
Once the non-EPS merchants have been moved to non-EPS numbers where they can continue to process transactions, and the only merchants processing transactions using the EPS numbers are EPS merchants, in order to ensure the continued, uninterrupted operation of EPS' business and the ability of EPS' merchants to process transactions using those numbers as voluntarily agreed to by TSYS, can the numbers be transferred from TSYS as the subscriber to EPS as the subscriber, as they should have been all along since 2005?

The FCC should resolve this issue in the affirmative when it is ripe.

VI. CONCLUSION

This case has become a poster child of what is not supposed to happen in an arbitration. Arbitration is to be simple, informal and expeditious.¹⁰ It is to be the end, not the commencement of litigation.¹¹ TSYS has generated not one, but two post-arbitration federal lawsuits, losing both. Now TSYS seeks to use the FCC as its latest tool in its history of litigation abuse. The FCC should decline TSYS' attempts to involve the Commission in already completed breach of contract litigation between two parties. TSYS' petition should be denied. Granting TSYS' petition will simply invite numerous other failed litigants to bring their breach of contract claims to the Commission for a second (or third or fourth) chance to overturn adverse rulings made in arbitrations or federal courts.

RESPECTFULLY SUBMITTED this 23rd day of February , 2011



Scotty P. Krob
Attorney for Electronic Payment Services LLC

¹⁰*Mitsubishi*, note 2, above.

¹¹*San Martine Compania de Navegacion, S. A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961).

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2011, I electronically transmitted the foregoing document to the Federal Communications Commission using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECT registrants:

Scott R. Fick
Glenn S. Richards
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Counsel for TSYS Acquiring Solutions, LLC

Michael R. McCarthy
Senior Vice President, Associate General Counsel
TNS
11480 Commerce Park Drive, Suite 600
Reston, VA 20191-1406
(703) 453-8314
Counsel for Transaction Network Services, Inc.,

Thomas J. Navin
Thomas R. McCarthy
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
Counsel for Transaction Network Services, Inc.,

